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IN THE

# Supreme Court of the United States

October Term, 1971

No. 70-2421

SANDRA ADICKES and JAMES HORELICK,

*Petitioners,*

*against*

HOWARD R. LEARY, Police Commissioner of New York City, FRANK S. HOGAN, District Attorney of New York County, ANDRE CLERMONT, Custodian, Washington High School, GERARD OAK, Principal, Washington Irving High School,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR RESPONDENT FRANK S. HOGAN IN OPPOSITION TO PETITION FOR CERTIORARI

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## BRIEF FOR RESPONDENT FRANK S. HOGAN IN OPPOSITION TO PETITION FOR CERTIORARI

### Preliminary Statement

Petitioners Sandra Adickes and James Horelick seek a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit entered January 7, 1971, which unanimously affirmed an order of

the United States District Court for the Southern District of New York, which dismissed petitioners' complaint in a suit seeking an injunction, a declaratory judgment and damages.

## Statement of the Case

### The Arrests and Initiation of State Criminal Proceedings

The petitioners were arrested and, in complaints filed in the New York City Criminal Court, were charged with criminal trespass and resisting arrest. On or about October 4, 1968 a labor dispute developed between the New York City Board of Education and the United Federation of Teachers resulting in the closing of public schools in the city. On October 16, the Board of Education directed that the schools be opened and available to students where a competent and qualified teacher appears at a school (A 17).* To implement that policy, district superintendents were authorized to issue letters of designation, appointing certain teachers as "Teacher-in-charge" (A 18). This directive also established procedures to be followed should the designated teacher be unable to secure access to the school building (A 18).

On October 17, 1968, the principal of Washington Irving High School, as he had for several days previously, directed that the school should be closed; the District Superintendent designated Mr. Edward Williams "Teacher-in-charge" at that school (A 19).

*References preceded by "A" are to the pages of petitioners' appendix in the Court of Appeals.

On that date, a group of nonstriking teachers, including both petitioners, appeared at Washington Irving High School in New York City, demanding admission to the closed school. Both petitioners were assigned as teachers in the school.

At about 12:45 p.m., the school custodian, Andre Clermont, observed the petitioner Horelick inside the closed building. Upon the request of the custodian, Patrolman John Van Houten of the New York City Police Department placed Horelick under arrest for trespassing. Horelick attempted to evade custody, wrestled and attempted to kick the police officer (see A 20). As Horelick was being placed in a police car, Adickes, who was still outside the school building, attempted to pull Horelick from the car (see A 21).

Both petitioners were arrested and were given summonses to appear in court. On October 22, 1968, complaints were filed in the New York City Criminal Court (A 20, 21). Horelick was charged with the misdemeanors, criminal trespass in the second degree [N.Y. Penal Law §140.10] and resisting arrest [N.Y. Penal Law §205.30]. Adickes was charged only with the misdemeanor of resisting arrest [N.Y. Penal Law §240.30]. A charge of harassment [N.Y. Penal Law §240.25] was added thereafter (see A 7).

In a separate incident, on October 20, 1968 at about 12:01 a.m. Horelick refused to leave Washington Irving High School at the request of the custodian, Andre Clermont and Patrolman John Hodne of the New York City Police Department. Horelick was arrested and again summonsed. In a complaint filed in the New York City

Criminal Court on November 2, 1968, he was again charged with criminal trespass in the second degree. N.Y. Penal Law §140.10 (A 22).

The three matters were adjourned several times and consolidated for trial. The cases were set for trial on September 30, 1969, petitioners having waived their statutory right to a three-judge bench. See N.Y.C. Crim. Ct. Act §40.

**The Removal Proceedings**

On the morning of September 30, 1969, on the day set for trial, during the pendency of the instant proceeding for an injunction, petitioners served upon the District Attorney of New York County and the New York City Criminal Court a petition for removal, pursuant to Title 28 U.S.C. §§1443(1), (2).

In a petition alleging that the strike was illegal, the circumstances of their arrest and their attempts to desegregate the New York City Public School system they sought to ground removal upon the Civil Rights Act of 1968, 82 Stat. 73. In effect, they claimed that since 18 U.S.C. §245, as added by the Civil Rights Act, made it a crime to interfere with one who was attempting to provide certain facilities to others, without discrimination on account of race, color, religion or national origin, they were persons who were

> "denied or cannot enforce in the Courts of such State a right under any law providing for the equal civil rights of citizens of the United States." 28 U.S.C. §1443(1).

On October 7, 1969, Judge SYLVESTER J. RYAN granted a motion, made pursuant to 28 U.S.C. §1447(c) to remand; the remand was to become effective on October 14, 1969 (A 37). Thereafter, petitioners moved in the Court of Appeals for the Second Circuit for a stay of the state trial pending the appeal of the remand order. On October 10, 1969, the Court denied the motion. Petitioners then applied to the Supreme Court of the United States that day for a stay of the trial on the criminal charges. Mr. Justice HARLAN denied their application on October 13, 1969; on October 20, the full bench denied the stay. *Horelick* v. *New York*, 396 U.S. 873.

On February 27, 1970 the Court of Appeals affirmed Judge RYAN's order. *New York* v. *Horelick*, 424 F.2d 697. The Court, per Judge FRIENDLY, held that "the ordered functioning of state legal process, whatever the motivation," was not the intimidation "by force or threat of force" referred to by 18 U.S.C. §245(b). Accordingly, the removal petition was held to have been unfounded. After the affirmance petitioners sought a stay of the mandate from Mr. Justice HARLAN, who denied it on March 12, 1970, and from Mr. Justice STEWART, who denied it on March 17, 1970. A petition for certiorari was thereafter denied. *Horelick* v. *New York*, 398 U.S. 939, *reh. denied*, 400 U.S. 883 (1970).

**The Instant Proceeding Which Attempted to Enjoin the Trial and to Obtain Damages**

On September 25, 1968, five days prior to the date set for trial, petitioners served upon the District Attorney of New York County a summons and complaint in the instant

action returnable in the District Court for the Southern District of New York. The complaint named as parties defendants, Howard R. Leary, as Police Commissioner of the City of New York, Andre Clermont, as Custodian of Washington Irving High School, Gerard Oak, as principal of Washington Irving High School and Frank S. Hogan, as District Attorney of New York County.

The complaint alleged three causes of action. The first claim, after setting forth facts concerning the strike and arrests (A 4-8), charged that the defendants Oak, Clermont and Leary "acting individually and/or in concert" "urged" the defendant Hogan to press the criminal charge against petitioners despite the fact that "all defendants well knew that the trespass charges were baseless, and that if any resistance were made by plaintiffs, it was reasonable" (A 8-9). They claimed that the defendant Hogan refused to dismiss the charges, relying on New York Penal Law Section 35.27, which statute they claim is unconstitutional, and that the trespass statute, New York Penal Law §140.10, "is patently inapplicable to the actions of plaintiffs" (A 10). And, they claimed that they were denied a jury trial (A 10-11). Damages in excess of $100,000 for each plaintiff were alleged (A 12).

The second cause of action alleged further "that defendants at all times mentioned herein were engaged in a conspiracy to deprive them of their privileges and immunities as citizens" and specifically claimed that defendants Clermont, Oak and Leary "importuned agents of defendant Hogan" requesting him "not to drop the charges against plaintiffs" (A 12-13). Additional damages in excess of $100,000 were claimed.

In the third cause of action petitioner Adickes alleged that while the criminal case was pending, her attorney informed her that the defendant Hogan had information that at the time of her arrest "she had kicked a policeman in the groin." She claims that her counsel had told her that the district attorney had agreed that if the kicking incident had not occurred the case against her would be dismissed. Accordingly, she alleges that she relied on the advice of her counsel and the representations of an assistant district attorney and on June 18, 1969 took a polygraph test. She alleged finally that she was informed by her counsel that she had "'passed' the lie detector (polygraph) test, i.e., had not kicked the police officer in the groin" but that the defendant Hogan refused to dismiss the case (A 13-15). Again, plaintiff alleged $100,000 in damages.

The prayer for relief requested an injunction to prevent the prosecution of the pending criminal charges against petitioners; a declaratory judgment to declare New York Penal Laws Sections 35.27 and 140.10 unconstitutional and declaring that the denial of petitioners' request for a jury trial on these charges was unconstitutional; and damages in the amount of $500,000 (A 15-16). Petitioners further moved in the District Court for a temporary restraining order preventing their prosecution on September 30, 1969. That application for the temporary restraining order was denied (Bryan, J.).

By motion returnable October 7, 1969, the plaintiffs sought the convening of a three-judge court and a stay of the state trial and each of the defendants sought a dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)

(A 28-31). The Attorney General of the State of New York moved to intervene in defense of the state statutes and to dismiss the complaint (A 23-7). Judge SYLVESTER J. RYAN on December 1, 1969 denied the motion for a three-judge court and granted the motion to intervene and the motions to dismiss. Judge RYAN held:

> "The status of the plaintiffs is that the criminal cases against them are pending unresolved in the State court. The Constitutional objections of plaintiffs are available to them in the State Court, and, of course, on appeal from any adverse verdict in the criminal case. Nothing alleged by plaintiffs constitutes more than the usual burdens which fall upon defendants charged in State courts with unlawful conduct. A federal court is in no wise warranted in interfering with a State prosecution still in its embryonic stage when the parties have not even attempted to exhaust their State court remedies.
>
> "A fair reading of plaintiffs' complaint reveals the absence of any factual allegation that defendants conspired to deny plaintiffs equal protection of the law or equal privileges and immunities under the laws. No discriminatory purpose is asserted to have motivated the defendants. Absent such, the complaint fails to state a claim upon which relief can be granted Cf. *Snowden* v. *Hughes*, 321 U. S. 1 (1943). Plaintiffs can hardly claim a Constitutional right to be immune from arrest for conduct alleged to be in violation of the statutes involved. No claim cognizable under the Civil Rights Act has been asserted by plaintiffs." (A 33-4).

On June 18, 1970, prior to the argument of the appeal to the Court of Appeals for the Second Circuit, both petitioners were tried in the Criminal Court of the City of New York, and were convicted as charged. Each was

sentenced to pay a fine of $250 or to serve 30 days in jail on each count. A notice of appeal was filed to the Supreme Court of the State of New York, Appellate Term, First Judicial Department. The execution of the judgments have been stayed pending the outcome of the appeal. The respondent Frank S. Hogan, in an affidavit setting forth the fact of the convictions, moved, in the Court of Appeals, to dismiss the appeal as moot.

On January 7, 1971, the court below affirmed the order of Judge RYAN and denied the motion to dismiss. *Adickes* v. *Leary,* 436 F.2d 540. The unanimous court, per Judge SMITH found that as a result of the convictions "all that remains before us on appeal is the claim for damages." 436 F.2d at 542.

The court below also rejected the claims for damages. Relying upon the complaint and exhibits filed in the District Court, Judge SMITH noted:

> "Exhibit B annexed to the complaint makes it quite clear that Williams, the designated teacher-in-charge, was not authorized to try to force his way in, and indeed there was no authorization to delegate his authority to enter, even peaceably. The trespass arrests were therefore not illegal, and no question survives as to section 35.27, for the resistance was not to an illegal arrest."

He also concluded that

> "The argument based on *Dombrowski* v. *Pfister,* 380 U.S. 579 (1965) must also fail, since the prosecution was not only not in bad faith, but justified and there is no basis pleaded for a claim of a continuing threat of harassing prosecutions in the future."

And, finally, the Court rejected the complaint of petitioner Adickes:

> "The claim of Miss Adickes against District Attorney Hogan is frivolous and was properly dismissed. Affording an opportunity to take a polygraph test, or failing to carry out an alleged promise by a prosecutor to abide by its results can by no stretch of the imagination be elevated to a civil rights violation. Voluntary submission to such a test, even if it proved 'demeaning and an indignity,' hardly shows a lack of due process, nor does a breach of an alleged contract of doubtful legality, to drop a prosecution if such a test were 'passed.'"

The appeal from the judgments of conviction is *sub judice* in the state courts.

Petitioners assert jurisdiction in this Court pursuant to 28 U.S.C. §1254(1).

## ARGUMENT

**The court below preperly held that after the petitioners' conviction in the courts of New York State no substantial issues remained in their suit for an injunction and damages.**

Petitioners Adickes and Horelick seek to have this Court review by writ certiorari, a decision of the United States Court of Appeals for the Second Circuit which sustained the dismissal of their complaint. Petitioners had, in the complaint, sought to preclude their trial in the courts of New York on charges of criminal trespass and resisting arrest. They also asked for declarations of

invalidity of two New York statutes. Neither of these aspects of the case are still viable. The petitioners were unsuccessful in seeking a stay of the trial and they have been convicted. Accordingly, the injunction requested could no longer be issued and would not provide any relief. And, as to the declaratory judgment sought, no issue remains. The state trial revealed that one of the statutes, New York Penal Law §35.27 was not applied to petitioners; and this Court has already passed upon the constitutionality of the other, N.Y.C. Crim. Ct. Act §40. *Baldwin* v. *New York,* 399 U.S. 66 (1970). In short, even absent the difficult procedural hurdles that the complaint could not overcome [see *Younger* v. *Harris,* 401 U.S. 37 (1971); *Samuels* v. *Mackell,* 401 U.S. 66 (1971)], federal equitable relief would be unavailable.

Petitioners argue, however, that their claims for damages are not mooted by their conviction and should not have been dismissed.

The complaint, read in a light favorable to petitioners, alleges that they were both damaged by their arrest and prosecution in violation of their constitutional rights. Whatever the merits of the claims with respect to the other respondents, it is clear that no claim is asserted as to the respondent Hogan under the first and second counts, the allegations in effect being no more than that the other respondents "importuned" him not "to drop" the charges. Indeed, since the New York law gives a prosecutor no right "to drop" any charges [see N.Y. Code Crim. Proc. §671], there, of course, is no complaint applicable to the prosecutor.

Moreover, in light of the conviction of the petitioners—convictions currently *sub judice* in the state appellate courts—the conclusion of the Court of Appeals below, that the arrests and prosecution was "justified" [436 F.2d at 542] is correct. For surely the Civil Rights Acts should not be interpreted to mean that damages could ever be recovered for a legal arrest and conviction, nor to allow the litigation, under the guise of a damage suit, of the legality of the state prosecution, prior to the exhaustion of the normal state appellate process. Nor does anything in the recent opinions in *Bivens* v. *Six Unknown Named Agents,* 402 U.S. —— (1971), suggest that the federal courts have been opened to the institution of damage suits to, in effect, test the validity of a state prosecution. For, while the majority of the Court has said that the violation of a criminal defendant's constitutional rights is remediable in the federal courts, the institution of a "civil rights" suit prior to the expiration of the state appellate process does no more than create litigation that cannot be brought to any conclusion until the state criminal process is completed.

The third cause of action alleged that petitioner Adickes was harmed by the acts of the respondent Hogan. Specifically she claimed that she suffered humiliation because she took a "lie detector" test relying upon an asserted promise "to drop" the charges if she passed. She claimed that she passed and the promise was not fulfilled. As a cause of action it is frivolous. Appellant alleged merely that she voluntarily did an act in the hope of obtaining the exercise of discretion in her behalf. Surely the doing of the act does not give rise to a damage suit under 42 U.S.C. Section 1983.

The court below correctly held:

> "Affording an opportunity to take a polygraph test, or failing to carry out an alleged promise by a prosecutor to abide by its results can by no stretch of the imagination be elevated to a civil rights violation. Voluntary submission to such a test, even if it proved 'demeaning and an indignity,' hardly shows a lack of due process, nor does a breach of an alleged contract of doubtful legality, to drop a prosecution if such a test were passed."

And, in any event, from the allegations of the complaint it appears that the alleged act of the defendant Hogan, the breached "promise," was performed in the course of his official duties. Accordingly, it is well settled that the defendant is immune from suit under Section 1983 [see, *e.g.*, *Fanale* v. *Sheehy*, 385 F.2d 866, 868 (2d Cir. 1967); *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967)]. Thus, the complaint for damages was properly dismissed.

## Conclusion

***The petition for a writ of certiorari should be denied.***

Respectfully submitted,

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July, 1971